across pay periods. Pet. App. 20a-21a. There is, therefore, no need for this Court to consider that question.

2. Petitioners' remaining arguments are equally without merit and do not warrant further review.

a. Petitioners suggest (Pet. 22-23) that failing to credit extra compensation against overtime liability is an enhanced penalty designed to punish the employer, rather than compensate the employee. The FLSA, however, specifies with careful precision the circumstances in which an employer is entitled to a credit; here, petitioners simply did not establish that they were entitled to one. Instead, the district court found (Pet. App. 28a-29a), and the court of appeals affirmed, that petitioners "had failed properly to record overtime hours and pay proper compensation for such hours," *id.* 17a; that petitioners' "violations were 'willful' within the meaning of 29 U.S.C. § 255(a)," *id.* at 21a; and that they "do not satisfy the good faith reasonable belief exception to liquidated damages provided by 29 U.S.C. § 260," *ibid.* See *id.* at 33a-35a, 38a.[3] The resulting award was no less, but also no more, than the statute requires, and clearly

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[3] Liquidated damages are not a penalty, but compensation to the employees for the delay in receiving the wages due as a result of the employer's FLSA violation. See *Herman* v. *RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2d Cir. 1999) (citing *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 583-84 (1942)). Courts have discretion to deny the award of liquidated damages *only* if the employer shows that it acted in subjective "good faith" and had objectively "reasonable grounds" for believing that its conduct did not violate the FLSA. 29 U.S.C. 260; see also *RSR Sec. Servs.*, 172 F.3d at 142. The employer bears the burden of proving both good faith and reasonable grounds, and the burden is a heavy one; double damages are the norm. 172 F.3d at 142; *Reich* v. *Southern New England Telecomm. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997); *Brock* v. *Wilamowsky*, 833 F.2d 11, 19 (2d Cir. 1987).

does not exact an extra-statutory penalty from petitioners.

b. Petitioners contend (Pet. 23) that the "work period limitation" in this case is particularly inappropriate because the damages are averaged over work periods without accounting for any potential business changes over the time period in question. The district court, in its second decision, and the court of appeals, in its second summary order, considered that fact-bound argument and both courts soundly rejected it. Pet. App. 4a (characterizing petitioners' new evidence as "unreasonable"), 11a-12a (finding petitioners' expert witness testimony regarding the growth of Levinson's business "entirely unpersuasive"). Petitioners' attempt to relitigate that case-specific issue here is unpersuasive and unworthy of this Court's review. See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) ("A court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

c. Petitioners suggest that the court below disregarded a stipulation between the parties regarding the amount that petitioners paid their employees. Pet. 24.[6] Petitioners interpret the stipulation to mean that the Secretary agreed that they had "paid $529,000.00 in excess premium overtime wages during the ADP period." Pet. 25. The stipulated facts, however, as reflected in the district court's first order (Pet. App. 26a-27a), contain no such agreement. Rather, the parties stipulated

[6] The stipulations entered into between the parties and listed in the pretrial order (see Pet. 25) are incorporated into the findings of fact by the district court in its April 20, 2001, judgment. Pet. App. 24a-27a.

that the Secretary's transcriptions of petitioners' payroll records were accurate, with some exceptions, as to the gross wages paid, the "punch detail report hours," and the hourly rates paid to employees. *Ibid.* Moreover, the court of appeals did not improperly disregard any stipulation, but rejected petitioners' reasoning, concluding, for the reasons previously discussed, that any "purported 'overpayments' * * * provide no basis for a credit." *Id.* at 21a.

3. Petitioners argue (Pet. 26-30) that the lower courts' damages calculations have not been demonstrated to be "a matter of just and reasonable inference," in accordance with this Court's instructions in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). By its terms, that argument is not worthy of further review because "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. In any event, the courts below correctly concluded that the Secretary met her prima facie burden to establish as a matter of just and reasonable inference the amount and extent of work that employees had performed without being properly compensated in accordance with the FLSA. Pet. App. 4a, 18a-19a, 36a. Petitioners failed to rebut that inference. *Id.* at 4a, 18a, 37a.

As recognized by the court of appeals in this case, under the FLSA, "[t]he burden is on an employer properly to record hours, and an employee need only as a *prima facie* matter present an estimate of damages that is satisfactory as 'a matter of just and reasonable inference.'" Pet. App. 18a (quoting *Mt. Clemens*, 328 U.S. at 686-687). Employees who have not been properly compensated are not required to recreate with precision the record of hours worked which their employer—in viola-

tion of law—failed to keep. See *Mt. Clemens*, 328 U.S. at 687. Instead, the burden shifts to the employer to provide evidence of the precise number of hours worked, or alternatively, the employer may provide evidence demonstrating that the plaintiff's estimate was unreasonable. See Pet. App. 18a (quoting *Reich* v. *Southern New England Telecomm. Corp.*, 121 F.3d 58, 67 (2d Cir. 1997)). In this case, both the district court and the court of appeals accepted the Secretary's estimate of damages,[7] based on credible testimony from employees of Levinson and the time-clock records from the ADP period, Pet. App. 18a-19a, 28a-30a. The court of appeals, in its second summary order, noted that the district court, in considering the case on remand, allowed petitioners to present new evidence regarding the reasonableness of the number of overtime hours worked by Levinson's employees. *Id.* at 3a-4a. Despite the opportunity for a "second bite at the apple," petitioners failed to persuade either court below that the estimated damages in this case were unreasonable. *Id.* at 4a.

As this Court stated nearly 60 years ago in a dispute over unpaid overtime wages: "The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the require-

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[7] In its first summary order, the court of appeals affirmed the district court's judgment regarding the Secretary's estimation of damages in the ADP period. Pet. App. 19a. It remanded the case for the district court to recalculate the damages, for all but three employees, in the Paychex period. *Id.* at 19a-20a, 22a. The Secretary recalculated the Paychex-period damages in accordance with the instructions given by the court of appeals; the district court accepted the Secretary's recalculations and entered judgment against Levinson for the revised damages total. *Id.* at 9a, 13a. The court of appeals affirmed. *Id.* at 5a.

ments * * * of the [FLSA]." *Mt. Clemens*, 328 U.S. at 688. In this case, the courts below, after fully considering and rejecting the same methodological arguments that petitioners are making here, properly concluded that the Secretary established as a matter of just and reasonable inference the amount and extent of work that employees had performed without being properly compensated for overtime in accordance with the FLSA. Further review of those arguments is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

United States Supreme Court

HAROLD LEVINSON ASSOCIATES, INC.,
A Corporation, and EDWARD BERRO,
Individually and as President,

Petitioners,

v.

ELAINE L. CHAO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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STATEMENT

A. This case raises an urgent question of public policy regarding whether an employer that, over a given period of time, absent any complaints by a single employee and prior to any enforcement action by the Department of Labor or any other enforcement agency, fully compensates its employees at premium rates higher than required by statute or the collective bargaining agreement should not be given credit for those payments in the event a subsequent claim is made for underpayment. The Fair Labor Standards Act of 1938 ("FLSA" or the "Act"), 29 U.S.C. § 201, *et seq.*, was enacted to, *inter alia*, compensate employees for the extra wear and tear of working more than 40 hours in a work week, not to provide a bureaucratic minefield for employers.

The application of the Act, including when the Department of Labor (the "Department") seeks to enforce the overtime provisions of the Act, concerns the sole question of whether the subject employees have been properly compensated. If the employees have been properly compensated by their employer for their overtime hours, whether the compensation was paid the following week, the following month or even the following year, the employer should be found to have complied with the express terms of the Act. Indeed, the Act, which is silent as to when compensation is required, does not impose any different requirement and there is no purpose served under the Act to hold otherwise. Thus, the failure to credit the employer's actual payment of excess compensation sufficient to satisfy all of the overtime payments due and owing to its employees and to instead require the employer to pay such sums a second or third time is contrary to the purpose of the Act and the remedies provided under Section 216(b), which are compensatory only and solely intended to make the employee whole, not to punish the employer.

More critically, it is antithetical to public policy to fail to credit the employer for those sums which it voluntarily paid to its employees prior to the commencement of any litigation or enforce-

ment action. It is to the employees' benefit—as well as the Department's—that employers make such voluntary payments to their employees. If, however, employers do not get credit for those payments that make their employees whole, assuming *arguendo* that they had failed to pay for overtime previously due, there will be no incentive for them to do so voluntarily.

In this case, the Department does not dispute that Petitioner Harold Levinson Associates, Inc. ("HLA" or "Petitioner") actually paid its employees $529,000 in overtime wages[1] during the ADP period[2] *over and above* the overtime wages it was obligated to pay by statute and the collective bargaining agreement. However, the Department argues, relying upon the opinions in the courts below, that HLA should not get the benefit of the actual payments it made to its employees and these monies should not be credited as an offset against overtime wages that the lower courts found were owed to HLA's employees for the earlier PCX period. This is contrary to the language of the statute and the policy it was enacted to promote.

Given that there is no credible contention that HLA did not pay said additional $529,000 for overtime hours, it belies credibility to suggest that said sum of money should simply get lost and not even be considered, when imposing a penalty that dou-

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[1] The Department relies on the erroneous statement of the court of appeals that Petitioners did not present evidence that these monies were paid "for any of the purposes specified at 29 U.S.C. § 207(h)," Pet App. 3a, but does not argue that these monies were not paid in compensation for overtime hours worked. Moreover, contrary to the statement in the opinion below, Pet. App. 3a and n.1, the evidence in the record before the Court of Appeals demonstrated that HLA made these payments for overtime work performed by its employees and thus fall squarely within the provisions of § 207(e)(5), (6) and (7) as incorporated by § 207(h).

[2] The time period at issue, May 1992 through December 1994, was divided into two subperiods based solely upon the payroll services company and recordkeeping mechanics utilized by HLA during those subperiods: the "PCX period" ran from May 1992 through September 1993 and the "ADP period" ran from October 1993 through December 1994.

bles the employees' compensation and provides a third time that each employee is fully paid for every overtime hour worked.

B. This Court has directed that the calculation of damages under the Act must be determined as a matter of just and reasonable inference. The employer may rebut the Department's calculations by demonstrating that inferences upon which the calculations are based are unreasonable. In this case, the Department and the courts below based their calculations upon the testimony of employee witnesses that they worked essentially the same amount of overtime throughout the period at issue. Petitioners demonstrated that this testimony was statistically and factually incorrect based upon the time clock records for the ADP period that were admitted to be accurate, and submitted further statistical and economic evidence that definitively demonstrated that the Department's calculations were unreasonable because they failed to account in any way for the dramatic growth in the company between the beginning of the period in issue and the end of the period in issue. The trial court found that notwithstanding that the volume of product and sales volume in dollars increased by almost 50% from one period to the next, that it was a matter of just and reasonable inference that the same number of employees could perform 50% more work in the same amount of hours. Notwithstanding the factual, logical, statistical and economic evidence submitted by Petitioners, which demonstrated that the employee witness testimony was inaccurate and unreliable, the courts below rejected Petitioners' evidence that the Department's calculations were unreasonable. This determination is in blatant disregard of this Court's direction in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 380 (1946), and requires review.

ARGUMENT

POINT I

THE PETITION SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUIT COURTS OVER WHETHER THE ACT ALLOWS AN EMPLOYER TO OFFSET EXTRA COMPENSATION PAID ACROSS WORK PERIODS AGAINST OVERTIME LIABILITIES OWED

The Department, in its opposing brief, sidesteps the question that has resulted in differing opinions by the Circuit Courts concerning whether premium payments made for overtime wages may be credited across time periods. *See* Pet. 19-20. In doing so, the Department fails to appropriately address the question of whether HLA should receive a credit for the premium payments it made to its employees during the ADP period, against any liability it may owe for overtime incurred during the PCX period. The Department does not address the language of the statute, the plain reading of which permits the credit of premium payments without limiting such credit to the work period in which they were paid, and the Department does not address the blatant absence in both the statute and the regulations of any requirement limiting an offset of premium payments to the work period in which the overtime liability was incurred; an absence made all the more conspicuous when contrasted with other sections of the statute in which such work period language is expressly included. The Department also does not address the provision in the Secretary's own Operations Handbook which allows for offset without imposing a work period limitation. Finally, the Department does not address the anomalous situation that currently exists due to the discord and inconsistencies in the rulings by the Circuit Courts considering the issue of allowing such offsets and credits.

Significantly, and the Department does not and cannot deny this fact, HLA paid an extra $529,000 in overtime pay-

ments to its employees during the ADP period over and above the overtime payments due under the statute and the collective bargaining agreement.[3] So, in its response, the Department seeks simply to ignore the fact that HLA actually paid—and its employees actually received—these extra payments at premium rates for their overtime work, and were thus fully compensated for any unpaid overtime accrued during the PCX period.[4] The Department seeks to accomplish this evasive maneuver by relying on the Court of Appeals' erroneous statement that there was no evidence in the record that the premium payments HLA made to its employees "'was paid for any of the purposes specified at 29 U.S.C. § 207(h)(2).'" Pet. Opp. 6 (quoting Pet. App. 3a). However, this statement by the Court of Appeals is clearly erroneous because it disregarded the clear evidence in the record that HLA made these premium payments specifically for the payment of overtime and that they were identified as such.

The Court of Appeals' statement was also clearly erroneous because it was predicated on a failure to properly apply the provisions of § 207(e) in reviewing these payments. Section 207(e) provides that all monies paid to an employee are included in the calculation of the employee's regular rate of pay, unless specifically exempted under one of the enumerated exceptions set forth in its subparagraphs. 29 U.S.C. § 207(e). The Department does not claim that the extra payments, totaling $529,000, which HLA actually made to its employees, must be included in its calculation of the regular rate of pay for the respective HLA employees, and did not actually include it in its calculations. However, in order to exclude those monies,

[3] During the trial on remand, the Department disputed certain small sums included in the overall figure; however, these sums are *de minimus*.

[4] Most, although not all, of the employees to whom overtime compensation was arguably due for the PCX period were also employed and received premium compensation in excess of the overtime required by the statute or collective bargaining agreement during the ADP period.

they must fall into one of the exceptions provided in § 207(e); neither the Department nor the courts below identify the basis on which these monies were excluded or claim that the payments were excluded because they fell into one of the subsections of § 207(e) other than subsections (5), (6) or (7). Thus the Department's position, as well as the decision below, is untenable because it leaves those monies hanging in limbo—not included in calculating the regular rate of pay and not excepted because they are captured in one of the subsections to 207(e)—a position that is improper under the statute.[5]

Moreover, the Department's position is in stark contrast to public policy and economic interests which preclude penalizing an employer that voluntarily pays its employees monies in excess of the amounts required under the statute or collective bargaining agreement. The FLSA was enacted "to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost." *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1948). Where an employee has received the actual compensation due, as envisioned by the statute, it is inequitable to find that the employer acted in violation of the Act. This is especially true here where Petitioner voluntarily paid more than required by the collective

[5] The monies paid by an employer must be accounted for under one of the subsections of 207(e) or be included in the monies used to calculate the regular rate of pay, regardless of whether the employer *also* contends that it made its premium overtime payments pursuant to a *Belo* plan or other prepayment plan to allow a steady income stream for an employee with irregular hours. 29 U.S.C. § 207(f); *Walling v. A.H. Belo Corp.*, 316 U.S. 624 (1942). Thus, contrary to the Department's suggestion, Pet. Opp. 6 n.4, the fact that Petitioners initially argued that there was a valid prepayment plan does not affect the separate question of how monies paid to an employee are classified under 207(e), or HLA's claim, which is supported by the evidence, that the premium compensation it paid falls under the provisions of 207(e)(5)-(7).

bargaining agreement and the statute to ensure that its employees would not suffer a reduction in their standard of living as the result of the terms of a collective bargaining agreement. Moreover, the failure to credit an employer when it has made compensation, even if it was made during a different work period, is against public policy because it discourages employers from correcting past errors. For example, if an employer discovers an accounting error from a previous period, public policy dictates that the employer should correct the error and ensure that the employee is properly compensated. If, however, the employer may be charged with a violation under the Act in any case and charged with paying that money a second or third time, it will have no incentive to make the adjustment upon discovery for fear of being mandated to make additional payments.

Furthermore, the damages awarded below are beyond the remedy provided by the statute in section 216(b), which is solely compensatory and intended to provide the employee with the funds that were due but had not been paid. 29 U.S.C. § 216(b); *Lanza v. Sugarland Run Homeowners Assoc., Inc.*, 97 F. Supp. 2d 737 (E.D. Va. 2000). If the monies due have already been paid, whether during the same work period or a later work period, and the employee has been made whole, then any requirement to pay those monies again is simply punitive. However, punitive damages are not available under this section and cannot be imported into the section from other parts of the statute because to do so would be inconsistent with the compensatory nature of the remedies provided. *Id.* The Department did not address the punitive effect of requiring HLA to pay a second and third time monies which the documents show it had paid—and its employees had received—long before the commencement of this action. Instead, the Department simply referred to the finding of liability without addressing the misapplication of § 216(b) here. Pet. Opp. 8-9.

The Department attempts to avoid the issue altogether by arguing that the stipulation between the parties prior to the commencement of the initial trial does not *expressly* state that HLA paid $529,000 in premium payments for overtime over and above the amount owed under the statute and the collective bargaining agreement. Pet. Opp. 9-10. However, the Department does not dispute that this figure is the incontrovertible result obtained by an application of the stipulated facts upon which the parties did expressly agree.[6] The court below improperly ignored the stipulation when it discounted the stipulated facts as "*assumptions* that were stipulated for trial." Pet. App. 21a (emphasis supplied).

POINT II

THE COURTS BELOW FAILED TO CALCULATE DAMAGES AS A MATTER OF JUST AND REASONABLE INFERENCE

The Court of Appeals, in its first decision, recognized that the Department's calculation of damages during the PCX period "unfairly penalizes the defendants" and that the Secretary's "actual computations of weekly hours for the PCX period" suffered from a "lack of foundation." (Pet. App. 21a n.3) On remand, the lower court and Court of Appeals did not cure the inherent deficiencies in the methodology utilized to calculate damages, and expressly rejected Petitioners' proffered statistical and economic methodologies that established a foundation for the "amount and extent of [uncompensated] work as a matter of just and reasonable inference," and that served "to negative the reasonableness of the [Department's] inference."

[6] The parties stipulated to the following facts: (1) the gross wages HLA paid to each employee; (2) the actual number of hours each employee worked; and (3) the hourly rate paid to each employee. Pet. Opp. 9-10. The amount of $529,000 is derived by using the second and third figures to calculate the amount earned by each employee and subtracting it from the gross wages each employee was paid, and the Department has never suggested otherwise.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. at 687-88. The issue here is not simply one of "erroneous factual findings or the misapplication of a properly stated rule of law," Sup. Ct. R. 10, and thus is not precluded from review. Rather, the question is whether a damage calculation can be determined to be a matter of "just and reasonable inference" when the Court rejected the unrebutted evidence derived from accepted scientific methodologies in favor of questionable factual testimony.

The damages for the PCX period are based upon a calculation importing figures from the ADP period derived from the time clock records for that period, which the parties stipulated were accurate. The importation was based upon the witnesses' anecdotal testimony six to eight years after the fact that they worked "about the same number of hours each week" during the two periods,[7] Pet. App. 30a, even though the Court of Appeals recognized, in its first decision, that even within the same period "[t]he time-clock records demonstrate that hours tended to fluctuate from one week to the next." Pet. App. 20a.

In contrast, Petitioners offered testimony based upon statistical and economic analyses of the relevant data. Petitioners offered unrebutted evidence that HLA's business increased dramatically on an annualized basis between the PCX period and the ADP period. Before making other analyses, Petitioners' experts examined whether the increase in business had an actual effect on the amount of time each person worked in overtime during the ADP period, based upon the time clock records. Petitioners' experts demonstrated that even within the ADP period, each employee worked an average of 10% more overtime at the end of the ADP period than he or she had at the beginning of that 15 month period. This statistical analysis is further evidence that the anecdotal testimony by

[7] The record evidenced that not a single employee made any complaint that they had not been fully paid for all overtime hours worked, including the employee witnesses who testified at trial.